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*Attorneys for Defendants Frito-Lay North America, Inc.  
and PepsiCo., Inc.*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

MARKUS WILSON and DOUG CAMPEN,  
individually and on behalf of all others  
similarly situated,

Wilson,

v.

FRITO-LAY NORTH AMERICA, INC. and  
PEPSICO, INC.,

Defendant.

Case No. C12-01586-SC  
Assigned to the Honorable Samuel Conti

**DEFENDANTS' REQUEST FOR JUDICIAL  
NOTICE IN SUPPORT OF MOTION TO  
DISMISS FIRST AMENDED COMPLAINT**

**HEARING:**

Date: February 8, 2013  
Time: 10:00 a.m.  
Place: Courtroom 1

Pursuant to Rule 201 of the Federal Rules of Evidence, Defendants Frito-Lay North America, Inc. and PepsiCo, Inc. respectfully request that this Court take judicial notice of the attached exhibits in considering Defendants' concurrently-filed Motion to Dismiss Plaintiffs' Class Action Complaint.

Exhibit A is a chart listing cases filed in this Court between March 29, 2012, and November 1, 2012, by the same consortium of plaintiffs' firms, including Pratt & Associates; Nelkin & Nelkin; Don Barrett, P.A.; Charles Barrett, P.C.; Law Offices of Richard R. Barrett; Coleman Law Firm; Lovelace Law Firm; David Shelton P.L.L.C.; and Fleischman Law Firm. Exhibit G is a true and

correct copy of the Complaint filed on August 26, 1995, in *Truth in Labeling Campaign v. Shalala*, 999 F. Supp. 1289 (E.D. Mo. 1998). The Court may take judicial notice of the cases listed in Exhibit A and the Complaint included in Exhibit G, as publicly filed cases and court documents. *See Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th Cir. 1997) (noting court may take judicial notice of papers filed in other court proceedings).

Exhibits B through F are true and correct copies of packaging for the following products that are referenced in Plaintiffs' First Amended Complaint ("FAC") (*see, e.g.*, FAC at ¶¶ 16-17):

- Exhibit B: Lay's Classic Potato Chips
- Exhibit C: Lay's Honey Barbecue Potato Chips
- Exhibit D: Lay's Kettle Cooked Mesquite BBQ Potato Chips
- Exhibit E: Cheetos Puffs
- Exhibit F: Fritos Corn Chips

The Court may take judicial notice of these labels in considering the Motion to Dismiss. Federal Rule of Evidence 201 authorizes judicial notice of facts that are not "subject to reasonable dispute in that [they] are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice of product packages is particularly appropriate because under California law "the primary evidence in a false advertising case is the advertising itself." *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (Cal. 2003). When "food product labels form the basis for Plaintiff's allegations . . . the Court takes judicial notice of these materials." *Anderson v. Jamba Juice Co.*, No. 12-cv-01213-YGR, 2012 WL 3642835, at \*2 (N.D. Cal. Aug. 25, 2012) (citing *Wright v. Gen'l Mills, Inc.*, 2009 WL 3247148 (S.D. Cal. Sept. 30, 2009)); *see also Dvora v. Gen. Mills, Inc.*, No. 11-1074, 2011 WL 1897349, at \*2 (C.D. Cal. May 16, 2011) (considering a "complete color copy" of product packaging on a motion to dismiss). Neither party can reasonably dispute the authenticity of the product labels, the contents of which Plaintiffs

1 alleged in their Complaint. (*See, e.g.*, FAC at ¶¶ 16-17.)

2 Dated: November 9, 2012

Gibson, Dunn & Crutcher LLP

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5 By: /s/ Andrew S. Tulumello  
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14 *America, Inc. and PepsiCo, Inc.*

**CERTIFICATE OF SERVICE**

I, Jenna Musselman Yott, certify as follows:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and am not a party to this action. My business address is 555 Mission Street, San Francisco, California, 94105, in said County and State. I certify that on the date indicated below, I electronically transmitted to the Clerk and to each of the persons named below, who are registered as CM/ECF Users and have consented to electronic service, the following document using the CM/ECF System:

**DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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and Campen**

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I further certify that on the date indicated below, I caused such document to be transmitted by PDF format via electronic mail to the parties and electronic mail addresses named above, and that the transmission was reported complete and without error. The foregoing document was printed on recycled paper.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 9, 2012

\_\_\_\_\_  
/s/ Jenna Musselman Yott  
Jenna Musselman Yott